IV. Procedures to Handle Labour Disputes

IV. Procedures to Handle Labour Disputes

1. Labour Dispute Mediation Procedure

The procedure involves several steps. Firstly, a party to a dispute submits petition to the committee for mediation. Next, after acceptance of the petition, the committee shall investigate the dispute and convene mediation meeting. If the mediation is successful and the parties reach agreement, the result shall be documented in a mediation note.

The start of the mediation procedure depends on the application of a party to a labour dispute. Article 14 of *Rule of Organisational Structure and Working Procedure of Enterprise Labour Dispute Mediation Committee* stipulates, that within 3 days since he know or should know about the infringement upon his rights, the party should petition in writing or orally to the Enterprise Labour Dispute Mediation Committee and fill out application form. However, it is not stipulated in the *Rule* whether the procedure shall be started upon receipt of petition of one party or both parties. But, majority of people think it is enough to start the procedure, if one party applies to the committee. Along with the social-economic development in China, organised mediation is becoming increasingly popular, while unorganised mediation is decreasing. Link of application for arbitration with the start of the procedure is not only socially accepted, but also recognised by other party to the dispute. However, it is still necessary to have confirmation from another party on the application for mediation. Once a party has raised a dispute to the committee for mediation and another party confirmed the application, the committee shall decide whether to accept the dispute. If the answer is in the affirmative, the committee shall start the mediation procedure. Such arrangement not only reflects wills of the two parties, but also enhance the efficiency of application by one party.

Another important step of the procedure is investigation of the application and acceptance of the case. In the same way as People's Court dealing with bills of indictment, the committee shall investigate the dispute in terms of jurisdiction, time limit and other factors. At present, Labour Dispute Mediation Committee looks after the same disputes as Labour Dispute Arbitration Committee, including disputes arising out of:

- Dismissal, discharge or lay-off of workers by enterprises;
- Resignation and demission by workers;
- Implementation of relevant laws and regulations on wages, insurance, welfare, training and work safety;
- Execution of labour contracts;
- Other disputes, if it is stipulated by other laws and regulations.

Besides, as Enterprise Labour Dispute Mediation Committee handles dispute which arises between the same enterprise and employees, the committee also have to check:1) whether the dispute has occurred between employees and the enterprise, where the committee is set up; 2) whether the application for mediation is made within the set time limit. The procedure will be started if all the conditions are met.

The core of the procedure is investigation of the dispute and organising negotiation. Before convening the negotiation meeting, the committee shall investigate the facts and reasons, over which the parties are arguing, including time and venue of occurrence of the dispute, process of disputing, key issue in the dispute and reasons. Fact finding involves:1) listen to the statement and explanations by the parties, ask questions as to know the real intention and request of the parties; 2) talk to insiders and other persons, who may know the dispute, to obtain first-hand information; 3)If necessary, go for field investigation to gain first-hand evidence; 4)request for expertise by relevant authorities, if the dispute relates to employment injury or other technical matters. Based on the findings, the committee chairman shall invite the parties to a negotiation meeting, in which other relevant organisations and individuals may also get involved. Generally, negotiation meetings are chaired by 1-3 mediators: those for simple disputes[3] are usually chaired by 1 mediator and those for complicated disputes are chaired by 2-3 mediators. The meeting usually is announced open by the speech of a mediator on the purposes and content of the meeting, relevant laws and regulations, social morals. The mediator also calls for the parties to be brave to admit wrongdoing and take the consequences, and to make efforts to reach agreement. After the speech by the mediator, the parties shall present facts and state their positions on the dispute. Next

[3] Whether it is a simple or complicated dispute is determined by the committee.

step, mediator(s), shall direct the parties to conduct debate in an abstentions and reasonable manner in order to clarify the situation.

There are two possible results of the negotiation: reaching agreement and failure to do so. If the disputing parties have reached consensus, the committee shall formulate a mediation note, indicating names and positions of the disputing parties, disputed matter(s), result of negotiation. The note shall be signed by the committee chair and the parties respectively, and produced in three copies to be kept by the parties and committee respectively. The agreement does not possess legal binding force and they parties should perform the agreement on voluntary basis.

Cultural traditions exert influence on the choice of the form of dispute settlement. In China, concepts of “Compromise is most precious ” and “Zhong Yong” (It can be translated in English as “Golden mean”). have long history and date back thousands years. For around two thousands years since Han dynasty, which rejected the various schools of thinkers and made Confucianism the single accepted and honored school, Confucianism was the dominating and orthodox cultural concepts. Confucius value orientation has been carrying great weight with Chinese in disputing and settling disputes. “Zhong” means middle, no bias. “Yong” means normal. So, for Chinese, unbiased mediation is a rational choice to settle disputes. For this reason, internal settlement within enterprise without going to public arena has been first choice of many disputing parties. Enterprise Labour Dispute Mediation Committees have played an important role in resolution of disputes. In addition, internal mediation within enterprise can reduce the social costs of the disputes and free the enterprises from troubles, resulted from inharmonious labour relations, so that enterprises can focus their full efforts on developing their business.

However, there are some drawbacks in the current mediation system. Firstly, the mediation procedure still shows traits of planned economy. Since it was reestablished in mid-1980s, the system was designed with earmarks of the time and in accordance with other social institutions of the days. Labour dispute mediation in enterprise was considered to be equal to the grass-root level People’s Conciliation system. Moreover, along with the speeding-up of urban economic reforms during the mid-1980s, enterprise reform, centred on expansion of autonomy and revitalisation of enterprises, became the priority of priorities. As a part of the enterprise reform, labour management, wage and

social insurance systems were changed. The labour mediation system was established to cope with disputes arising in the process of the reform. Consequently, the labour mediation system has characteristics of the transitional period. Secondly, the mediation procedure is an exclusive circle. Although many enterprises have labour dispute mediation committee, but there are little relations between those committees. If a dispute involves a third party or another enterprise, the committee will have nothing to do with them. Thirdly, the system is not suitable to regulate labour relations in market economy. Such committees are established in enterprises, which are only part of employing units in market economy. For employing units other than enterprises, there is no mediation committee to handle labour disputes. For this reason, mediation as a form of labour dispute settlement covers only enterprises. Fourthly, the system puts excessive emphasis on procedure itself. Strictly imitating arbitration and litigation, the mediation procedure is unduly rigid and lacks flexibility. Fifthly, the mediation note does not have legal biding force and therefore not legally enforceable, which makes no substantial difference between reaching agreement and failure in reaching agreement. This tends to preclude the arbitration agreement from being a final resolution to the dispute.

2. Labour Dispute Arbitration Procedure

The labour dispute arbitration procedure system includes jurisdiction, time limit, submission and acceptance of an arbitration petition, hearing of a dispute and etc.

2.1 Jurisdiction and time limit

Jurisdiction refers to the division of responsibilities in handling labour disputes among Labour Dispute Arbitration Committees at all levels and in different territories. At present, territory is the primary factor in determing jurisdiction, while level jurisdiction is also taken into consideration. Simple disputes are under the jurisdiction of the district (county)- level arbitration committee, where the disputing employee’s wage record is maintained. Major and complicated disputes are handled at provincial-level

(municipality-level) arbitration committees[4]. As for time limit, *Regulations of Settlement of Labour Disputes in Enterprises* stipulates that a party to a labour dispute should appeal to the arbitration committee for arbitration in writing within 6 months from the date when he knows or should know that his rights have been infringed upon. The arbitration committee shall accept a petition when a party fails to observe the time limit due to force majeure or other justifiable reasons. However, the period has been shortened by *Labour Law* 1994 from 6 months to 60 days. According to the principle of "The latter law precedence over the early law and the effect of law is superior to that of regulations", the provision on time limit in *Labour Law* is applied in arbitration practice.

2.2 Submission and acceptance of an arbitration petition

The arbitration procedure shall start, once a party has found an infringement upon his right and lodged a petition for restitution. Upon receiving the petition, the arbitration committee shall investigate it in terms of completeness of documents, territory and level jurisdiction, time limit and whether the petotion is made by a disputing party. If the answers are all in the affirmative, the committee shall fill out a form and submit it to the official in charge of the secretariat, requesting for approval to file the case. The official in charge shall make decision within 7 days after receiving the form. Within 7 days after making the decision, the committee shall notify the party of the decision in a written note. If the decision is affirmative, the committee shall also send a copy of the petition to the respondent and request him to file a bill of defence with related evidence within 15 days.

.

2.3 Hearing of a dispute

In handling labour disputes, the arbitration tribunal shall firstly mediate and try to bring the disputing parties involved together to reach an agreement on their own. In case an agreement is reached through mediation, the arbitration tribunal shall produce a mediation note. If no agreement is reached through mediation or if one party retracts before the note is delivered, the arbitration tribunal shall proceed promptly with a ruling.

---

[4] Currently there is no unified national standard on level jurisdiction. In practice, it is different in provinces, municipalities directly under the central government and autonomous regions.

According to *Rule on Organisational Structure and Working Procedure in Labour Dispute Arbitration Committee*, the hearing process consists of several steps: 1) ascertain the presence of the parties; 2) announce disciplines during the hearing; 3) explain the dispute, rights and responsibilities of the parties; 4) announce the members of the tribunal; 5) ask the parties whether to apply for withdrawal; 6) investigate the dispute and ask the parties to make statement regarding to the dispute; 7) mediate; 8) adjourn the hearing for collegial discussion; 8) continue the hearing, announce the ruling or suspend ruling. Arbitration tribunal shall conclude all labour disputes within 60 days from the date of its setting up. If a case is so complicated that requires an extension of its mandate, the tribunal shall request the arbitration committee for approval, and the extension shall not exceed 30 days. After making ruling, the tribunal shall fill out a "Case Conclusion Form" and submit it to the committee chairman for approval. The mediation note shall take effect upon receipt by the parties. Arbitration award shall come into effect after 15 days of receiving the award, if the parties do not appeal it to People's Court.

2.4 Shortcomings in the present system

Firstly, the arbitration is mandatory procedure before litigation, and disputing parties are deprived of litigious right without prior arbitration. This means that arbitration committees have replaced judicial power with arbitral power, and the litigious right with the right to apply for arbitration. As a result, the committees have replaced People's Courts of first instance in handling labour disputes.

Secondly, arbitration award is a conditional, time-bound and effect-pending decision rather than a final resolution to a dispute. Despite arbitration can be conducted only for one time, the arbitration award is not a final resolution, as it have to wait for the parties' response before coming into effect. If a party disagrees with the ruling, he can proceed with the settlement process and bring the dispute into litigation. Such arrangement, to a certain extent, makes the arbitration procedure nominal and void.

Thirdly, the arbitration procedure is unduly rigid and lacks flexibility, strictly imitating the litigation procedure. For example, some of the time limits are set too long. Furthermore, the arbitration procedure still has "administrative colour" in terms of its approval requirement for filing and concluding a case.

Fourthly, there is logical contradiction in some provisions. The provision on level jurisdiction is a typical example. The logical basis of such level jurisdiction arrangement is the administrative affiliation among arbitration committees. In fact such relations do not exist. Furthermore, according to this logic, there should have been arbitration committees of second instance, which shall correct the rulings made by the committees of first instance. Only in this way, there will be level jurisdiction. In practice, it is a rare phenomenon in some areas that arbitration committees of different levels argue with each other to obtain a jurisdiction over disputes.

3. Judicial System for Labour Dispute Settlement

It is worth pointing out that China's judicial system for handling labour disputes is in a transitional period. On March 22, 2201, the Judicial Commission of the Supreme People's Court at its 1165th meeting adopted *Interpretations on Some Questions on Application of Laws and Regulations in Handling Labour Disputes* (hereinafter referred to as *Interpretations*), which have made substantial amendments to the existing judicial system for settling labour dispute. In this article, both the previous and new provisions are included so that our readers can have a clear picture of the system and its revolution.

3.1 Indictment and acceptance of an indictment

Before the issuance of the *Interpretations*, according to *Civil Procedure Law*, *Labour Law* and *Regulations on Settlement of Labour Disputes in Enterprises*, a party shall have right to bring a lawsuit to court, "if:

1) he is a party to the labour dispute. He can also appoint agents, if he can not bring a lawsuit himself;
2) he refuses to accept the arbitration award. The arbitration is mandatory, without which it is not allowed to bring a lawsuit;
3) there is clear indication of defendant;
4) there are clear claim and groundings for the claim;
5) it is within the time limit, which is set as 15 days after receiving the arbitration award."

However, the imposed preconditions have been loosened by the *Interpretations* in 2001. Article 2 of the *Interpretations* stipulates:" If the Labour Dispute Arbitration Committee refuses to accept a case grounding on the conclusion that it is not labour dispute, the Committee shall notify the party of the decision in a written note. If the party disagrees with the Committee's decision and brings a lawsuit in People's Court, the Court must deal with the appeal in one of the following way in accordance with the situation: 1)accept the case, if it is labour dispute…" Article 3 of the *Interpretations* stipulates:" In case a party disagrees with Labour Dispute Arbitration Committee's refusal to accept the dispute grounding on the expiration of 60-day time limit, set by article 82 of *Labour Law*, if the party brings a lawsuit, the Court shall accept the case." The above-mentioned provisions have loosened conditions for bringing a lawsuit in court. Some cases, which were not accepted before, have turned out to be acceptable now.

3.2 Jurisdiction

Before the issuance of the *Interpretations* there was no unified rule on jurisdiction over labour disputes. In some places, courts accepted the disputes, over which the arbitration committees in its territory had made the arbitration award. In other places, courts determined jurisdiction with reference to provisions on arbitration jurisdiction. As for more complicated level jurisdiction, courts in most provinces and municipalities accepted cases in accordance with arbitration level jurisdiction, viz, if a party disagrees with arbitration award made by county-level arbitration committee, he would appeal to county-level People's Court; if a party disagree with arbitration award made by city-level arbitration committee, he would appeal to city-level Intermediate People's Court. For example, according to *Interim Interpretation of Some Questions in Handing Labour Disputes* issued by Civil Tribunal of Beijing Supreme Court, "If a party to a labour dispute bring a lawsuit over the decision by Labour Dispute Arbitration Committee, People's Courts in Beijing shall accept the cases temporarily in conformity of the following principles: if a party disagrees with arbitration award made by Beijing Municipal Arbitration Committee, he shall appeal to the Intermediate People's Court in the place, where the enterprise is located. If a party disagrees with arbitration award

made by county-level arbitration committee, he shall appeal to the district(county)s-level People's Court in the place, where the Arbitration Committee is located…" According to the *Interpretations*, "a labour dispute shall come under jurisdiction of the grass-root level People's Court in the place, where the disputing enterprise is located or the labour contract is implemented. In the case when the place of implementing labour contract is not clear, the grass-root level People's Court in the place, where the disputing enterprise is located, shall accept the case".

3.3 Time limit

A special time limit system is adopted in labour dispute litigation. Firstly, the staring point to calculate time limit is the date when parties receive the arbitration award. Secondly, unlike the 2-year time limit (or 1 year in specific situations) in civil procedure, time limit in the labour dispute litigation can be called "mini time limit", as it is set within mere15 days after receiving arbitration award.

3.4 Proceeding

Currently, *Interpretations on Some Questions on Application of Laws and Regulations in Handling Labour Disputes* and *Civil Procedure Law* are applied in labour dispute litigation proceeding. The litigation procedure for labour disputes is quite similar to civil procedure, in terms of preparation before hearing, opening hearing session, courtroom investigation, court debate and making judgment. The principal difference is the acquisition and identification of evidence in courtroom investigation and court debate. Article 13 of *Interpretations* stipulates that enterprise shall be responsible to adduce proof in the cases of disputes, arising from dismissal, discharge of employees, termination of labour contracts, reduction of compensation, calculation of length of service and etc.

Labour dispute litigation procedure has direct influence on effectiveness of the labour dispute judicial system. Shortcomings in the procedure prevent the system from effective functioning. At present, there are some shortcomings in the litigation procedure and judicial system.

Firstly, the procedure is stipulated in such a fragmented manner that confuses not only parties to a dispute but also judges. When determining jurisdiction, time limit and

evidence adducing requirement, judges find it difficult to decide that they should apply *Civil Procedure Law* or *Interpretations*. Some disputing parties have no knowledge of the *Interpretations* at all. All of these have precluded effective protection of parties' rights. Many judges, particularly those in grass-root level courts, can not understand the relations between jurisdiction of grass-root level courts over labour disputes and territory jurisdiction over civil cases. The *Interpretations* have broken up the jurisdiction system in civil procedure by canceling level jurisdiction of labour disputes and assigning all labour disputes to grass-level courts. No matter how large it is the amount in controversy, how great is the public concern about the dispute, and how far-reaching is the impacts of the dispute, all the labour disputes are handled by grass-root level courts. The fragmented provisions have weakened the judicial system in handling labour disputes.

Secondly, there is a tendency of expanding administrative power and shrinking of judicial power in settling labour disputes. "Civil judicial power is part of political power, neither economic, administrative power nor religious power. It is the instrument of the state to settle civil conflicts." Jurisdiction of law courts is the judicial power of the courts in settling civil conflicts. Jurisdiction is a division of responsibilities between People's Courts and other state organs or organisations in handling and settling civil conflicts."[5] It is law provisions that determine the jurisdiction of People's Courts and other administrative organs over various conflicts. "In principle, jurisdiction of courts is not limited. There is so-called fundamental of" final settlement by judicial power", which means that any conflict, failing to be settled by other means, can be brought to courts and settled by judicial judgment." [6] Mandatory arbitration prior to litigation was first set up by administrative regulations of the State Council. Regulation of litigation and arbitration procedure by administrative regulatory documents have led to intervention of administrative power into the domain of arbitration power and judicial power. Particularly, the intervention of administrative power into the domain of judicial power has exhibited the expansion of administrative power and shrinkage of judicial power.

---

[5] Wang Xuerong, *China Civil Litigation*, Law Publishing House, page 87-89.
[6] Chen Guiming, *Concepts and Rules of Procedure*, China Legal System Publishing House, page 208.

Thirdly, vacuum has been created in jurisdictions over disputes, as regulations on arbitration procedure give clear definition of labour disputes to be settled through arbitration. This means that disputes, arising from factors other than those stipulated in the regulations, though employment-related, are not recognised as labour disputes, thus not protected by labour dispute litigation. Currently, "personnel dispute" is a typical example. Since 1988, when the Ministry of Labour and the Ministry of Personnel got Enterprise employees are administered by the Ministry of Labour, and employees of government organ and institutions are administered by the Ministry of Personnel. Since mid-1980s, the labour dispute arbitration organisations has reached a tacit agreement with courts that personnel disputes are excluded form the litigation proceeding. In recent years, personnel dispute arbitration system has been built up, but it still in the initial stage of development. Due to the lack of legal stipulation whether a personnel dispute can be brought to court or not, in practice some courts accept such disputes, while some not. In most cases, if arbitration committee refuses to accept the dispute, the parties can not expect protection from court. This runs counter to the fundamental principle " final settlement by judicial power".

Lastly, there is no distinction between right disputes and interests disputes, viz. law disputes and fact disputes. Acceptance of a dispute by People's Court is directed liked with arbitration, which handles both right disputes and interests disputes. Link between arbitration and litigation enables some interests disputes to enter litigation proceedings, which is against conventional theories and practice of civil procedure. In another word, an interests dispute refers to dispute arising from future interests or from straggling for interests. Generally, such disputes often take place in the process of collective bargaining between trade unions and employer's organisation, pursuing different interests. Since the subject-matter of such disputes is nor acquisition of right or infringement upon right, they can not be settled through litigation. In civil legal proceedings, courts can not make accurate, feasible and enforceable judgment to disputes without clear claim. Currently, though interests disputes are not litigable, courts have not made clear distinction between interests disputes in practice.